

GailAnn Y. Stargardter (Bar No. 250749)
gstargardter@archernorris.com
Andrew J. King (Bar No. 253962)
aking@archernorris.com
ARCHER NORRIS
2033 North Main Street, Suite 800
Walnut Creek, CA 94596-3759
Telephone: 925.930.6600
Facsimile: 925.930.6620

Attorneys for Plaintiff
ATAIN SPECIALTY INSURANCE
COMPANY f/k/a USF INSURANCE
COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ATAIN SPECIALTY INSURANCE
COMPANY f/k/a USF INSURANCE
COMPANY,

Plaintiff,

v.

NORTH BAY WATERPROOFING, INC.,
a California corporation; OPUS WEST
CONSTRUCTION CORPORATION, a
Minnesota corporation

Defendants.

Case No. CV 12-03339 EMC

**PLAINTIFF ATAIN SPECIALTY
INSURANCE COMPANY'S CASE
MANAGEMENT STATEMENT & RULE
26 DISCOVERY PLAN ; ORDER RESETTIN**
[FED.R.CIV.P. 26(f); L.R. 16-9] ^{CMC}

Date: November 14, 2012
Time: 9:30 a.m.
Dept.: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

Pursuant to Federal Rule of Civil Procedure 26(f), Civil Local Rule 16-9, and the Standing Order for All Judges of the Northern District of California dated July 1, 2011, plaintiff Atain Specialty Insurance Company f/k/a USF Insurance Company ("Atain") hereby submits this Case Management Statement & Rule 26 Discovery Plan.

Atain submits this report on its own behalf, and not as a joint report, due to: (a) the entry of default against defendant North Bay Waterproofing, Inc. ("North Bay") which has failed to appear in this action; and (b) the fact that recently-added defendant Opus West Construction Corporation ("Opus West") has not yet responded to the First Amended Complaint or otherwise

PLAINTIFF'S CASE MANAGEMENT
STATEMENT & RULE 26 DISCOVERY
PLAN

CASE NO. CV 12-03339 EMC

1 appeared in this action. (*See* Declaration of Andrew J. King, filed concurrently herewith.) At the
 2 request of Opus West's counsel, Atain agreed to provide an extension of time until November 19,
 3 2012 for Opus West to respond to the First Amended Complaint. (*Ibid.*)

4 **1. Jurisdiction & Service**

5 The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 and 28 U.S.C. §
 6 2201, and venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(1) and (c), and 28
 7 U.S.C. § 1391(b)(2). All parties have been served.

8 Defendant North Bay failed to appear or otherwise respond to the Complaint within the
 9 requisite time under the applicable federal rules. To date, North Bay has still not appeared or
 10 responded to the Complaint. At Atain's request, the Clerk entered a default against North Bay on
 11 August 21, 2012. (Docket 12.)

12 At the time Atain filed its initial Complaint in this action, Opus West had filed a Chapter
 13 11 petition for bankruptcy in the United States Bankruptcy Court for the Northern District of
 14 Texas. Atain's original Complaint set forth Atain's intent to seek leave to file an amended
 15 complaint to name Opus West as a defendant, once Atain had obtained relief from the bankruptcy
 16 stay. On September 5, 2012, the Bankruptcy Court issued an Order lifting the automatic stay and
 17 any applicable discharge injunctions to permit Atain to file and serve an amended complaint upon
 18 Opus West in this action, and to prosecute its claims to final judgment.

19 On October 4, 2012, this Court issued an Order granting Atain's motion for leave to file a
 20 first amended complaint, naming Opus West as a defendant. (Docket 20.) On October 5, 2012,
 21 Plaintiff filed its First Amended Complaint in this action. (Docket 21.) Opus West was served on
 22 October 11, 2012. (Docket 22.) On November 5, 2012, counsel for Atain received a telephone
 23 call from counsel representing Opus West in the underlying construction defect action. Counsel
 24 for Opus West advised that she had just received a copy of the First Amended Complaint and
 25 requested an extension of time to respond. As a professional courtesy, counsel for Atain agreed
 26 to provide a two-week extension until November 19, 2012.

27 / / /

28 / / /

1 **2. Facts**

2 Atain issued three policies of insurance to defendant North Bay covering the policy
3 periods from January 2, 2005 through January 2, 2008 (the “Policies”). The Policies provide
4 commercial general liability coverage pursuant to all of the terms, conditions, limitations,
5 exclusions, and endorsements contained therein. Opus West has claimed status as an Additional
6 Insured under each of the Policies.

7 Developer STRS Ohio CA Real Estate Inv. 1, LLC (“STRS”) filed a construction defect
8 action against general contractor Opus West and subcontractor North Bay, among others, in the
9 Superior Court of California, County of Sonoma, in an action styled *STRS Ohio CA Real Estate*
10 *Inv. 1, LLC v. Alcal/Arcade Contracting, Inc., et al.*, Case No. SCV-246738 (the “Underlying
11 Action”). The Underlying Action arises out of the construction of a residential apartment
12 complex located in Santa Rosa, California, commonly known as The Boulders at Fountaingrove
13 (the “Project”). The operative complaint in the Underlying Action asserted claims against North
14 Bay and Opus West for breach of contract, breach of guaranty, breach of implied warranty,
15 negligence, and violation of California Business and Professions Code § 17200, *et seq.*

16 The operative complaint alleges that the Project “consists of ten 3-story apartment
17 buildings containing 124 residential dwelling units as well as a leasing office, pool and
18 community center.” STRS alleges that Opus West was the general contractor for the Project, and
19 that North Bay provided the waterproofing system. STRS avers that, “in and around 2008,”
20 STRS discovered water intrusion and other defects at the Project.

21 Indian Harbor Insurance Company (“Indian Harbor”), acting on behalf of its insured
22 North Bay, tendered the defense of North Bay in the Underlying Action to Atain. Atain
23 disclaimed coverage for the claims asserted against North Bay in the Underlying Action, based
24 primarily on the “Total Residential Construction” exclusion, set forth in Endorsement RBJ 048 12
25 (03/98) (TOTAL RESIDENTIAL EXCLUSION—FORM B), which was included in each of the
26 Policies, and which excludes coverage for the defense or indemnification of claims for “‘property
27 damage’, . . . ‘arising from’ any work or operations performed . . . in connection with any
28 condominium, townhome, single family dwelling and any other residential or tract housing

1 project.”

2 Indian Harbor, this time acting on behalf of Opus West, then tendered defense of Opus
3 West in the Underlying Action to Atain, based upon Opus West’s claimed status as an additional
4 insured under the Policies. Atain disclaimed coverage for the claims asserted against Opus West
5 in the Underlying Action, based upon several applicable policy provisions, including the “Total
6 Residential Construction” exclusion. Non-parties Indian Harbor and North American Capacity
7 Insurance Company, (“NAC”) both purporting to act on behalf of Opus West, have disputed the
8 application of the Total Residential Construction exclusion and have demanded that Atain defend
9 and indemnify Opus West in the Underlying Action.

10 In order to fall within the scope of the Coverage A insuring agreement contained in each
11 of the Policies, any “property damage” must first manifest during the policy period. The claims
12 asserted against North Bay and Opus West in the Underlying Action do not fall within the
13 insuring agreements of the 2005-2006 Policy or the 2006-2007 Policy because the operative
14 complaint alleges that the “property damage” first manifested “in or about 2008,” which is after
15 the expiration dates of the 2005-2006 Policy and the 2006-2007 Policy. Therefore, Atain
16 contends that is has no duty to defend or indemnify North Bay or Opus West against the claims
17 asserted in the Underlying Action under the 2005-2006 Policy or the 2006-2007 Policy. Atain
18 believes that the claims will also likely fall outside of the scope of the Coverage A insuring
19 agreement for the 2007-2008 Policy because that policy expired on January 2, 2008.

20 Moreover, the Policies’ “Total Residential Construction” exclusion applies to eliminate
21 any potential for coverage under any of the Policies for the claims asserted against North Bay and
22 Opus West in the Underlying Action, because the operative complaint alleges, and the extrinsic
23 evidence confirms, that the property at issue is a 124-unit *residential* apartment project.
24 Accordingly, Atain contends that it owes no duty to defend North Bay or Opus West in the
25 Underlying Action under any of the Policies. Atain has also expressly reserved its rights to assert
26 that other policy terms, conditions, limitations, and exclusions apply to eliminate coverage.

27 / / /

28 / / /

1 **3. Legal Issues**

2 Plaintiff Atain seeks a declaratory judgment that it does not owe a duty to defend or
3 indemnify North Bay or Opus West against the claims asserted in the Underlying Action,
4 pursuant to the terms of the Policies and applicable law.

5 **4. Motions**

6 Plaintiff anticipates filing a motion for summary judgment at the earliest opportunity.

7 **5. Amendment of Pleadings**

8 Plaintiff filed its First Amended Complaint on October 5, 2012, which added Opus West
9 as a defendant. Plaintiff does not currently anticipate further amendments to the complaint, but
10 reserves the right to seek leave to do so. Plaintiff proposes a deadline of March 31, 2013 for
11 amendments to the pleadings.

12 **6. Evidence Preservation**

13 Plaintiff has taken all appropriate steps to ensure the preservation of relevant evidence,
14 consistent with its obligations under the applicable federal and local rules.

15 **7. Disclosures**

16 Due to the failure of any defendant to appear in this action, Plaintiff has been unable to
17 conduct a Rule 26(f) conference as contemplated under the federal and local rules, and the parties
18 have not yet exchanged their Rule 26 initial disclosures. Plaintiff intends to schedule the Rule
19 26(f) conference as soon as possible after defendant Opus West files its responsive pleading, and
20 at that time set a date certain for exchange of the disclosures.

21 **8. Discovery**

22 No discovery has occurred to date. Plaintiff Atain anticipates promptly moving for
23 summary judgment based primarily upon the complaint in the Underlying Action and the
24 Policies. Atain may serve targeted requests for production of documents, interrogatories, and
25 requests for admission. Plaintiff reserves the right to take the depositions of defendants.
26 Plaintiff may also seek documents and deposition testimony from third parties pursuant to
27 subpoena. If necessary, plaintiff may seek the entry of a stipulated protective order to facilitate
28 the production of certain confidential or proprietary information.

9. Class Actions

Not applicable.

10. Related Actions

The Underlying Action – *STRS Ohio CA Real Estate Inv. I, LLC v. Alcal/Arcade Contracting, Inc., et al.*, Case No. SCV-246738 – pending in the Superior Court of California, County of Sonoma.

11. Relief

Atain seeks a declaration that it does not owe, and has never owed, a duty to defend or indemnify North Bay or Opus West in the Underlying Action.

12. Settlement and ADR

The parties have not discussed settlement or ADR. On October 26, 2012, Plaintiff filed its ADR Certification. Atain has not, however, had an opportunity to discuss or select an ADR process or teleconference due to the defendants' failure to appear in this action. Atain does not believe that settlement or ADR is appropriate for this matter in that Atain requires a judicial declaration that it does not owe a duty to defend or indemnify defendants in the Underlying Action.

13. Consent to Magistrate Judge For All Purposes

On July 19, 2012, Plaintiff declined to consent to a magistrate judge.

14. Other References

Plaintiff does not believe that the case is suitable for reference to binding arbitration or that any other reference is appropriate at this time.

15. Narrowing of Issues

Plaintiff does not believe that the issues can be narrowed at this time, but reserves the right to seek the bifurcation of issues, claims or defenses at trial.

16. Expedited Trial Procedure

Plaintiff does not believe that this case is suitable for an expedited trial procedure.

//

//

17. Scheduling

Plaintiff tentatively proposes the following dates for expert disclosures, discovery cutoff, last date to hear dispositive motions, pretrial conference and trial:

- Expert disclosures, pursuant to Rule 26(a)(2)(A) and (B) – **June 2013**
- Rebuttal expert disclosures, and disclosures pursuant to Rule 26(a)(2)(C) – **July 2013.**
- Discovery cutoff – **September 2013**
- Last day to file dispositive motions – **October 2013**
- Last date for hearing on dispositive motions - **November 2013**
- Pretrial conference – **February 2014**
- Trial – **March 2014**

18. Trial

Plaintiff believes this matter is suitable for a bench trial, and has not demanded a jury trial. Plaintiff estimates the length of trial as 1-3 days.

19. Disclosure of Non-party Interested Entities or Persons

Plaintiff filed its required certification and disclosure statement on June 28, 2012. Plaintiff restates that AJK Holdings, LLC, is the parent company of plaintiff ATAIN SPECIALTY INSURANCE COMPANY.

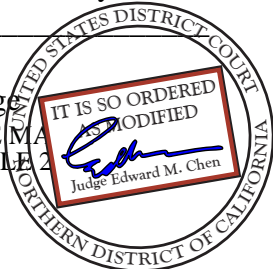
20. Other

Plaintiff submits that, in the interests of judicial economy and efficiency, a continuance of the case management conference presently scheduled for November 14, 2012 may be warranted, given that defendant Opus West has not yet appeared in this action and Plaintiff has afforded Opus West an extension until November 19, 2012 to respond to the First Amended Complaint. No other issues at this time.

Dated: November 7, 2012
IT IS HEREBY ORDERED THAT
the CMC is reset for 12/14/12 at
9:00 a.m. An updated joint CMC
statement shall be filed by 12/7/12.

ATA015/1472749-1
Edward M. Chen

U.S. District Judge
PLAINTIFF'S CASE MANAGEMENT
STATEMENT & RULE 26
PLAN



ARCHER NORRIS

/s/ Andrew J. King

GailAnn Y. Stargardter

Andrew J. King

Attorneys for Plaintiff

ATAIN SPECIALTY INSURANCE COMPANY

f/k/a USF INSURANCE COMPANY